

UZ-CRTRC  
versus  
BELGRAVIA MEDICALS (PVT) LIMITED  
and  
SIMBARASHE MARUVA  
and  
LINDA PAIDAMOYO ZINYAKATARIRA  
and  
TAFADZWA CHEHANGA

**Opposed Application for damages-*Exception to the Summons.***

HIGH COURT OF ZIMBABWE  
KATIYO J  
HARARE, 11 January & 22 June 2022

*H Mutasa*, for the Plaintiff (respondent)  
*S P Mamimine*, for the Defendants (applicants)

**KATIYO J:** This is an exception by the first to the fourth defendants to summons issued out of this court by the plaintiff on 16 September 2021 against the defendants. The plaintiff (respondents) in this matter approached this court seeking damages from the defendants (applicants) jointly and severally the one paying the others to be absolved:-

- a) payment in the sum of US\$35,929.30;
- b) Interest there on at the prescribed rate calculated from date of summons to date of payment in full; and
- c) costs of suit.

**Brief background**

The plaintiff claim arises from various agreements of sale which were concluded between the applicant and the first respondent during period stretching from February 2020 to August 2021 in terms of which the plaintiff purchased from

first defendant the goods that are listed in the provided schedule which is attached as *Annexure A*. It is averred that at the time the plaintiff concluded these agreements it was on the basis of misrepresentation at the instance and connivance of all the defendants as a result of which the applicant has suffered prejudice in the sum of money indicated therein. Despite demand, the defendants have failed or neglected to pay the amount claimed as indicated above. The plaintiff alleges that the defendants represented that the first defendant's price of US71, 108 for the said goods was the lowest or alternatively the most reasonable, or a fair market value of the goods in question.

Such misrepresentation were material to the said sales and were made with the intention of inducing the applicant to act upon them and to enter the said sale agreements. The plaintiff relying upon the truthfulness of such representations, was so induced to enter into the said agreements of sale and to pay to the first defendant the sum of US 71, 108, 00 for the goods in question. The said representations were, to the knowledge of the defendants false in that the lowest or most reasonable or fair market value of the goods in question was US35, 178, 70. Consequently the applicant has suffered damages in the some of US35, 929, 30

Contended that third defendant is liable by virtue of being the first defendant's Director and also participated in the transactions and fourth defendant by virtue of being an employee of the plaintiff and also participated in the transactions.

The defendants (now the applicant in this matter) are opposed to this claim arguing that there is a total misdirection on the part of the plaintiff who even failed to distinguish between contracting parties and their agents. He argues that the plaintiff also failed to recognize the doctrine of *legal perona* as applicable to both common and company law.

Further argued that there is no cause of action disclosed by the summons as per paragraph seven of the declaration. Further that the claim does not indicate whether it is under contract or delict. Further that the contract was between the plaintiff

and the first defendant and all others were agents. These arguments were put as exceptions to these summons. In response Mr. Mutasa for the plaintiff argued that the application by the defendant's legal practitioner was an abuse of court process averring that a summons cannot be more elegant than it is. Further that fraud has been disclosed as a cause of action. That once one talks of misrepresentation he is talking of delict. He claimed costs at higher scale.

What the court has to consider is whether the application to the exception of the summons holds merit.

For a summons to stand it should disclose cause of action. In this matter the cause of action is said to be flowing from the alleged misrepresentation as regards lowest or fair or reasonable value or price of the goods offered for sale to the applicant by the first respondent. The plaintiff alleges that had it not been for the misrepresentation he would not have bought the goods in question at that price and could have avoided the loss so suffered. The said misrepresentation is flowing from a contract entered into by between the plaintiff and the first defendant voluntarily and without any undue influence. The second defendant is only cited by virtue of being first respondent's former employee. There is no cause of action against him.

### **Exception to summons**

It the case of *Wattle Company Ltd v Mukubvu and Anor* HH 840-19 the learned judge held that "Where an exception is upheld the court does not dismiss the party's claim unless it is clear the party does not have intention to amend its pleadings. In this case no such intention has been expressed by or attributed to the plaintiff. On this basis it is appropriate that the plaintiff be granted leave to amend its summons and declaration".

In this matter the defendant (applicant herein) contends that the summons and the declaration disclose a cause of action and no intention to amend has been

expressed meaning that he stands on the summons and declaration as they are. Looking at the summons and the declaration talk of misrepresentation of the true value of goods which is according to the plaintiff (respondents herein) was too high in the circumstances. For one to get to the root of this argument is to define what misrepresentation means. Misrepresentation can be defined as situation where one of the parties is induced to enter into a contract by words or conduct that creates a false impression. These false impressions are created before the parties enter into the contract and they actually induce the innocent party to enter into the contract which he or she would not have entered into the contract had the actual facts been made known.

Sanctity of a contract provides that once a contract has been entered into freely and voluntarily it becomes sacrosanct and courts should enforce it. In simpler terms means persons interested in a particular transaction have given their consent to it and are satisfied, the law may safely step in with its sanctions to guarantee that right by fulfillment of reasonable expectations. In *Madoo (Pvt) Ltd v Wallace* 1979 2 (SA) 957 the court held that system of law pays great respect to the sanctity of contract. The Court would rather uphold than reject it. More so in the case of *Old Mutual Shared Services (Pvt) Ltd v Shadaya* (HC 9146/11) (2012) ZWHHC 15 (02 September 2012). It was held that the doctrine of sanctity of contract holds in Zimbabwe. In *Meyers-Mbidzo NO v Chipunza and Another* HC 1520/08(2009) ZHHC (20 January 2009). The Court took the view that poor business decisions and greed cannot be allowed to interfere with the sanctity of contract. What it means the courts cannot do anything where the contract is concerned unless there is serious fraud or breach of contract.

Without necessarily going on to the merit the facts of this matter are almost common cause and the particulars of claim the plaintiff relies on are all agreed but simply that it cannot form cause of action as the facts stand.

The question is whether inflating price in a contract can amount to delict or misrepresentation where the other party willingly accept the price without any

verification or confirmation.

Each party to a contract must take steps to ensure that the subject matter in discussion is what is intended. Fixing a high price cannot itself be held to be fraudulent because each party is supposed to do their due diligence before committing themselves. There is no price control in our jurisdiction currently meaning businesses are free to fix prices as long as it remains reasonable. It is not like when the plaintiff entered into these various contracts she was not aware of the prices. So for one to take that as cause of action is stretching the court too far. The exception to the summons raised in my view has merit.

In the final analysis I am persuaded by application of the exception to the summons as raised in that it does not disclose any cause of action. The Court therefore orders as follows:

1. The point *in limine* for exception to the summons for want of cause of action be and is hereby upheld.
2. Should the plaintiff persist with the action she is hereby ordered to amend her summons within ten days of this order and thereafter proceed in terms of the rules.
- 3 No order as to costs.

*Gill ,Godlonton,Gerrans*, plaintiff's legal practitioners  
*Nyamundanda and Mutimudye Attorneys*, defendant's legal practitioners